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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 330

BALTIMORE TRANSIT COMPANY AND
GERALD M. HARRISON,
Petitioners,

v.

STATE OF MARYLAND, FOR THE USE OF
GLORIA S. GEILS, ET AL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents cannot accept the petitioners' statement of the questions presented. The first question as stated by petitioners asks whether this Court should review a case in which the court below "has, by the effect of its judgment in reversing a jury verdict in favor of petitioners, overruled *Erie R. Co. v. Tompkins*" (Pet. p. 3). This is a complete distortion. The second paragraph in the opinion of the majority below opens

> "Both parties to this appeal concede, and we agree, that the federal courts are bound in diversity cases by the applicable state rules with respect to the effect to be given to presumptions, 'since the effect accorded these presumptions may substantially affect the rights of the parties and there is nothing in the Federal Rules to the contrary.' 5 Moore's Federal Practice, §42.0[5]."

The Court of Appeals has not "overruled" *Erie R. Co. v. Tompkins* but has explicitly acknowledged the binding effect of Maryland law and has attempted to apply that law in this case. The decision by the Court of Appeals is not "in open derogation of the binding State law as announced by the highest court of the State" but is a fair, earnest and reasoned attempt to discover and apply that law. The first question as stated by petitioners assumes the truth of what is simply untrue and has no applicability to this case.

As to the second question, the Court of Appeals did not "evade" the controlling state law (Pet. p. 3), but the judges in the Court of Appeals merely disagreed as to what that law was. The controlling state decision, as will be shown below, does in fact warrant and even require the reading given it by the majority of the Court of Appeals. There is, in any event, not the slightest basis for the apparent reflection on the integrity of the court below carried by the allegation in petitioners' question that the court below tried to "evade" the law as laid down by this Court in *Erie*.

As to the third question, there was likewise nothing sought to be "hidden" (Pet. p. 3) by the Court of Appeals and the implication that the opinion of the majority was a subterfuge is totally unwarranted and uncalled for.

There is only one question presented by the petition:

Whether this court should deny certiorari to review an extremely narrow and somewhat complex point in the

Maryland decisional law as to jury instructions on presumptions, where the majority of the court below (which included the former Chief Judge of the Maryland Court of Appeals, Honorable Simon E. Sobeloff, who was the only member of the court below from Maryland), found the Maryland law to be contrary to petitioners' contention.

STATEMENT

Petitioners' statement must be supplemented and corrected in the following respects:

1. Circuit Judge Haynesworth of South Carolina, who dissented on the merits, joined with the other members of the court in the unanimous decision to deny a rehearing (App. B, pp. 48-49).

2. The petitioners' statement alleges that "the majority bottomed its judgment upon what they erroneously referred to as the principal case of *Grier v. Rosenberg*, 213 Md. 248, 131 A. 2d 737 (1957)." (Pet. p. 6). There is nothing erroneous about the majority's reference to the *Grier* case as being the principal Maryland case. The petitioners' own language in its statement on its second "Question Presented" (Pet. p. 3) refers to the case as "the admitted controlling State decision".

3. The petitioners' statement claims that the majority below misread the Maryland court's opinion in *Grier* for two stated reasons "each essential to support the reversal of the verdict of the jury and the judgment thereon" (Pet. p. 6). Apart from the fact that neither of the stated reasons is "essential" to the reversal, which depends upon whether *Grier* as a whole can be fairly read as the majority read it, the petitioners' statement misreads or misrepresents the majority opinion below.

Petitioners claim that the majority below erred in saying that Judge Prescott, speaking for the Maryland court in *Grier*, "explicitly pointed out that the precedents in that State recognize no basis for any distinction between the presumption of due care and the presumption of agency arising from the fact of ownership" (Pet. p. 6). The language of the majority below on the point was as follows:

> "The defendant here also argues that the presumption in Grier v. Rosenberg is different from the presumption of due care here considered and thus that case may not be taken as a precedent. With this argument we must also disagree, * * *."
>
> "Our dissenting Brother similarly misinterprets Grier v. Rosenberg and would unduly restrict its rule. We perceive no basis in law or in logic for the suggested distinction; but, more importantly, Judge Prescott, speaking for the Maryland Court, explicitly pointed out that the precedents in that State recognize no basis for any distinction between the presumption that the decedent exercised due care for his self-preservation and the presumption of agency arising from the fact of ownership. And this observation of Judge Prescott is immediately followed by the very sensible question, '[I]ndeed, if the instruction be not granted, how is the jury to know of the presumption?'" (App. A, pp. 17-18).

The language of the *Grier* opinion referred to and identified by the majority opinion below is as follows:

> "This Court also has previously approved the granting of instructions of this nature, relating to negligence. Indeed, if the instruction be not granted, how is the jury to know of the presumption?" (App. A, p. 41).

The majority below were correct in characterizing the language of the Maryland Court as explicit, in the dictionary sense of this term, i.e., clear, open, express and

without ambiguity. The Maryland Court could not have pointed out more clearly that there is no distinction between the nature of instructions on the effect of a presumption of agency and the nature of such instructions in the negligence field.

The Maryland Court in *Grier* reached its conclusion as to the presumption of agency on the basis of the authorities in Maryland dealing with presumptions in negligence cases. Moreover, *Grier* quoted with approval from Dean McCormick's discussion (App. A, p. 42) dealing with jury instructions on presumptions generally; the Maryland Court was not limiting its decision to the presumption of agency or to any particular kind of presumption but was ruling that whatever the presumption the better practice is "* * * *to mention the presumption* * * *" (App. A, p. 42, Italics supplied by Maryland Court of Appeals).

Next, petitioners state (Pet. p. 9):

> "Under a long line of Maryland cases, the distinction between the presumption of agency in *Grier* and the presumption of due care is that a presumption of agency must be rebutted by evidence which is conclusive, uncontradicted and uncontroverted. Whereas, a presumption of due care will not survive evidence to the contrary or testimony that tends strongly to show the existence of fault."

However, the majority below clearly pointed out that petitioners' contention is totally in error because:

> "The defendant in this appeal argues that Grier v. Rosenberg is not applicable because the evidence there offered in rebuttal of the presumption was so slight that the trial court would have been justified in holding that it was insufficient to be submitted to the jury in the face of the presumption, but such was not the holding of the court. Indeed, the appellant in the Grier case made the point in an effort to secure a re-

versal instead of a remand for a new trial, but the argument was rejected. The court expressly held that the conflicting evidence was enough to take the case to the jury." (App. A, p. 17).

Finally, petitioners claim that the majority below was in error in stating that "the Maryland Court reviewed and cited cases involving the presumption of due care in negligence cases in support of its opinion in *Grier*" (Pet. p. 6).

It is true that the cases cited in *Grier* involved presumptions of lack of due care. However, there is no rational basis for distinguishing between the presumptions dealt with in the authorities reviewed in *Grier* and the presumption of due care involved in the instant case. The conclusion of the majority on this point is, therefore, sound; and, in any event the quoted language was only the least of three stated reasons for rejecting petitioners' argument that *Grier* did not apply to this case because of alleged distinctions between the presumption of agency and the presumption of due care.

4. The majority opinion does not "repudiate the binding effect of State law upon Federal Courts in a diversity case and add to the State decision language of its own decisive of the very issue presented" (Pet. p. 7). Where petitioners are carried away to the point of saying that "it is beyond dispute that the Circuit Court of Appeals violated the mandate of this Court in *Erie R. Co.* case" (Pet. p. 7), the petitioners lose all semblance of fairness in advocacy.

REASONS FOR DENYING THE WRIT

The foregoing corrections and supplementations of the statements made in the petition sufficiently demonstrate that this case is not one for the granting of certiorari and that to grant review here would be simply to squander

the valuable and limited time of this Court which must be carefully budgeted for devotion to important matters of national interest.

The petition fails to establish the existence of any of the grounds of the type enumerated in Rule 19 for the granting of certiorari. There is no federal statutory or constitutional question raised by the record.

The decision of the Court below deals with an extremely narrow and complex point of the Maryland law of evidence which is of no interest beyond Maryland.

The Court of Appeals is closer to questions of Maryland law and has greater experience with such questions than this Court, especially in view of the distinguished experience of the Chief Judge of the Court of Appeals as a member of the Bar and as Chief Judge of the Maryland Court. This Court does not sit as a Court of appellate review on questions of State law.

The decision of the Court of Appeals is a fair and correct exposition and application of the controlling Maryland law.

CONCLUSION

For the foregoing reasons the petition for Certiorari should be denied.

Respectfully submitted.

PAUL BERMAN,
Counsel for Respondents.